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Supreme Court of the United States

OCTOBER TERM 1946

No. 358

SUNCOOK VALLEY RAILROAD, PETITIONER

v.

BOSTON & MAINE RAILROAD

PETITION FOR WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

STATEMENT OF THE CASE

1. THE SCOPE OF THIS BRIEF

This petition is addressed to the decision of the New Hampshire Supreme Court in the case of *Boston & Maine Railroad v. Suncook Valley Railroad*, 94 N. H. 81, 46 Atl. 2d. 773. Because it seems so clear, as hereinafter pointed out, that the Federal questions which the petitioner undertakes to bring to this Court for review were in no way involved in the decision of the New Hampshire Supreme Court, we will not undertake at this time to argue the merits of those questions and this brief will be devoted simply to the proposition that the New Hampshire decision involved no Federal questions to give the petitioner the right to a review by this Court.

2. THE FACTS

Because the pertinent facts are largely set forth in the New Hampshire Court's statement of the case and its opinion printed at pp. 144-148, inclusive, of the Record, the facts will be detailed here only to the extent necessary to correct inaccuracies and omissions in the petition and to supplement the facts already

stated in the New Hampshire Court's opinion and in the petition to the extent necessary to enable this Court to properly understand the case. It should be noted at the outset that the petitioner's counterclaim on which it seeks recovery in this case is based solely on the provisions of an admittedly valid lease of the Boston & Maine Railroad to Suncook Valley Railroad, dated May 25, 1936, and approved by the Public Service Commission of New Hampshire and by the Interstate Commerce Commission (R. p. 144; see also the Petition for Writ of Certiorari, p. 2). Under the terms of this lease Suncook Valley Railroad was given a lease of the Suncook Loop, so-called, extending for approximately 7 miles northerly from the Town of Suncook to the point where it intersected with the easterly line of the Boston & Maine's main line right of way and trackage rights from there on into the City of Concord to the north.

In 1939 the Boston & Maine deeded a tract of land in Bow on the west side of the northerly 550 feet of the leased portion of the Suncook Loop to the Merrimack Farmers' Exchange. As will more fully appear from an examination of the deed and plan of this tract (Df's. Exhs. 13 and 13a) and from an examination of the plan of the tracks and construction in this vicinity (Pl's. Exh. 2) and from the findings of the Superior Court, this tract on which the mill was later constructed was situated in the angle formed by the intersection of the Boston & Maine's main line with the Suncook Loop, so-called. It was bounded on the northwest by the Boston & Maine's main line right of way, on the northeast by the Suncook Loop right of way, on the north by a triangle bounded southerly by the tract conveyed to the Exchange, northwesterly by the Boston & Maine's main line right of way and northeasterly by the Suncook Loop right of way; and could have been served, (1) from the Boston & Maine's main line to the west, (2) from the northerly portion of the leased portion of the Loop or (3) by means of a longer switch and more expense to the Exchange from that portion of the Loop to the north of the leased portion (R. pp. 17, 144, 145). By December 1941 the Exchange had completed the construction of a mill on this tract of land and sidetracks had been put in to serve the mill from the northerly 300 feet of the leased portion of the Suncook Loop, so that the

Boston & Maine in hauling freight to and from the Exchange as it did thereafter used about 300 feet of the northerly end of the leased portion of the Suncook Loop (R. p. 144). The Boston & Maine had prior to this time been serving the Exchange at a former site in the Concord freight yard. The new mill which it has been serving since December 1941 and the 300 feet of the leased portion of the Loop are also located in the Concord freight yard (R. pp. 17, 144), so that the new operations from 1941 to March 1945, of which the petitioner complains in this case, involved simply the continuation of the Boston & Maine's former service to the Merrimack Farmers' Exchange at another point within the Concord yard limits.

For a period of over three years, and until March 1945, the Boston & Maine continued to serve the Exchange in its new location without "a word of warning or . . . any other act . . . to indicate that it [the petitioner] claimed the revenue from such service or . . . that the plaintiff had no right to provide the freight service to the Exchange. Defendant's silence, with such knowledge, indicated acquiescence and assent" (R. p. 19). The Exchange bought the tract in question and constructed its new mill upon assurances from the Boston & Maine that it would be served by it (R. p. 144). "It would not have made the move it did if it would have had to depend upon the service of the Suncook, which was unsatisfactory to it. The Suncook could not have gotten the business of the Exchange" (R. pp. 17, 144, 145). As further pointing up this situation, in the language of the Superior Court

"When the construction of the new mill was under consideration, the defendant was in serious financial difficulties. Its service was inadequate and unreliable. Its total rail equipment consisted of one engine and one passenger car. Its roadbed was dilapidated in many places . . . Its general manager unsuccessfully attempted to persuade the Exchange Officials that the defendant could serve the new mill adequately, but the officials did not dare to risk their venture on the unsatisfactory type of service defendant was able to give. The defendant would not have obtained the Exchange business even though the defendant had retained control of the 550 feet of trackage at Bow Junction." (R. p. 17)

As further pointing up the circumstances as they existed in 1941, the Boston & Maine's Requests for Findings, Nos. 3-5, inclusive, were granted by the Superior Court (R. p. 21), as printed at p. 12 of the Record, as follows:

"3. The construction of the sidetracks at the Exchange mill at Bow by the Boston & Maine Railroad, and the operations of the Boston & Maine Railroad in servicing the Exchange mill at Bow resulted in no loss of revenue by the Suncook Valley Railroad.

4. Adequate railroad service was vital to the Merrimack Farmers' Exchange (see Record, p. 147).

5. The Suncook Valley Railroad was in 1940 and 1941 and has ever since been unable to furnish adequate switching service at the Exchange mill at Bow."

In view of these circumstances, an agreement in amendment of the 1936 lease, of which neither the Boston & Maine nor the Suncook Valley asked approval of either the Public Service Commission of New Hampshire or the Interstate Commerce Commission, was executed effective as of November 1, 1941. By the terms of this agreement (Pl's. Exh. A) it was provided that the northerly 550 feet of that portion of the Suncook Loop included in the 1936 lease should no longer be under lease to the Suncook Valley and that the Suncook Valley should thereafter have track-age rights only over this 550 feet into which the switches serving the Exchange mill were cut. Confronted with a suit to recover an admitted indebtedness of \$37,233.49 (R. p. 15), the petitioner in March 1945 (R. p. 19) for the first time objected to the transaction of the Exchange business by the Boston & Maine and filed its counterclaim to recover, under the provisions of the May 25, 1936 lease, tolls and revenues collected by the Boston & Maine in the transaction of the Exchange business at the new site (R. pp. 10, 11).

The Boston & Maine justified its position on three grounds:

- (1) that there could be no recovery under the terms of the original lease (B. & M.'s brief in the State Court, pp. 15 *et seq*);
- (2) that if the first defense fail, the amended lease was valid without the approval or authorization of either the Public Service

Commission of New Hampshire or the Interstate Commerce Commission (B. & M.'s brief in the State Court, *pp. 35 et seq*); and (3) that even if the lease amendment required commission approval, it was not void for lack of it but was at the most an illegal agreement and that the petitioner could not recover under well recognized authority to the effect that where the parties are in *pari delicto* there can be no recovery of any sums collected under an illegal contract (B. & M.'s brief in the State Court, *pp. 39 et seq*). The State Court sustained our first position so that it became unnecessary to consider issues raised by our second and third defenses.

ARGUMENT

The Federal questions which the petitioner seeks to have reviewed by this Court are stated at pages 1 and 2 of the petition for writ of certiorari and need not be restated here. They all involve questions raised by Boston & Maine's second defense which *might have been material* in and *might have been decided* by the Supreme Court of the State of New Hampshire, but which *did not become material* and *were not decided* by the State Court, because the State Court's decision sustaining the Boston & Maine's first defense made it unnecessary to consider its alternative defenses and the issues raised thereby. The question decided by the New Hampshire Supreme Court was a very narrow one. It appears in the statement of facts preceding the opinion of the Court, from which we quote as follows:

"Debt, for rent due under a lease dated May 25, 1936 . . . The defendant . . . filed a plea of set-off by which it sought from the plaintiff . . . the sum of \$146,575, which it alleged was due under the provisions of said lease. The defendant in its second supplemental brief stated its claim as follows: 'these "divisions" due the Suncook under the 1936 lease are what is sought by this counter-claim.' Issue was joined on this claim.

The portion of the lease relied upon by the defendant is as follows: 'The Maine hereby lets and demises unto the Suncook . . . and also all the rights, powers, privileges and franchises, tolls and revenues, which the Maine may now or at any time hereafter during the

term thereof lawfully exercise or receive in connection with the operation of said line of railroad; . . . ”
(R. p. 144)

As further showing the limited nature of the issue to be decided, the Court's statement of the case continues after pointing out that the revenues sought to be recovered were received by the Boston & Maine for services in the hauling of freight to and from the Exchange, rendered in good faith by the Boston & Maine, and that the petitioner could never have had the business, as follows:

“The defendant does not seek to recover from the plaintiff because of a breach of the covenant for quiet enjoyment or upon any other ground than the express provision of the lease above quoted; nor is this an action to recover possession of the tracks used by the plaintiff.”
(R. p. 145)

The nature of the Court's decision and the immateriality of the questions which the petitioner now seeks to have reviewed are further emphasized by the language of the opinion itself, in which the Court said

“There has been much discussion by both parties concerning the execution of the release, the matter of consideration, the need of approval by the Interstate Commerce Commission or the New Hampshire Public Service Commission and, if such is needed, the effect of the absence of it. In the present proceeding, however, the Maine does not have to justify its receipt of freight revenues from the exchange business. It is asking for no relief from the courts under the modifying indenture. *The Suncook must depend upon the strength of its claim. Since this is what it alleges, it must establish under the quoted clause of the lease its legal right to the revenues paid to the Maine for the freight of the exchange hauled over a part of the 550 feet of the loop that was purportedly released.*” (R. p. 146)

The Court then proceeds in that portion of the opinion appearing at pp. 146 and 147 of the Record to demonstrate that

under any proper interpretation of the lease the tolls transferred to the petitioner under the terms of the lease were only tolls earned by the petitioner; that the tolls which the petitioner sought to recover were earned by the Boston & Maine, were not within the contemplation of the lease and, therefore, not assigned to the petitioner thereunder and not to be recovered from the Boston & Maine. And again referring to the questions upon which the petitioner now seeks a review, the Court said

“Accordingly it becomes unnecessary in this action to determine the validity of the modifying agreement.”
(R. p. 148)

In its frantic endeavor to support its claim that the State Court in some way upheld the validity of the “release” of 1941, the petitioner argues that a question can be determined by a state court through indirection and by the result of its decision and that this case in some way falls within the principle of *Lawrence v. State Tax Commission*, 286 U. S. 276. A complete and full answer to this claim is that that case is in no way analogous to the case at bar. The decision in that case is based on the premise that an answer to a Federal question was sought and no answer given even though the jurisdiction of the court had been invoked for that purpose. See the first paragraph at p. 282 of the opinion in that case. In that case a determination of the plaintiff’s rights necessarily involved a determination of a Federal question, which the Court for specious reasons refused to decide. In this case the petitioner’s rights depended solely on a question of New Hampshire law,—the interpretation of the admittedly valid lease of May 25, 1936. If the Court had undertaken to decide the Federal questions which the petitioner now presents to this Court for review and which became immaterial by reason of the Court’s interpretation of that lease to bar recovery, the petitioner’s rights would not have been affected thereby. As pointed out by the State Court, the petitioner had to rely on the strength of its own case; it relied solely on the lease of May 25, 1936; and it made no difference whether the “release” of November 1941 was valid or not. The petitioner could not recover in either case.

The petitioner in its further endeavor to support its position by argument clearly points up this distinction when it says at p. 11 of the petition for writ of certiorari

"The Courts of New Hampshire were not called upon to fix or determine reasonable compensation for the Boston and Maine's improper use of the Suncook's tracks. They were simply asked to establish the B. & M.'s liability arising from the unambiguous lease. . . Judicial assistance was sought, therefore, to preserve and maintain rights created by the Commission and not to inject the Courts into fields of administrative authority."

And right here lies the nub of this question. The petitioner did not invoke the jurisdiction of the New Hampshire courts to determine the validity or invalidity of the "release" to which the Federal questions which it now asks this Court to review were addressed. It did not ask the State Court to fix or determine reasonable compensation for the Boston & Maine's use of the track in question, and as pointed out by the State Court in its statement of the facts at p. 145 of the Record, it did not seek to recover for a breach of the covenant for quiet enjoyment nor to recover possession of the tracks used by the Boston & Maine. In the petitioner's own language above quoted, the New Hampshire courts "were simply asked to establish the B. & M.'s liability arising from the unambiguous lease. . ."

The petitioner's further allegation in the same sentence that the New Hampshire courts were asked to deny the validity of the modification of the lease requires brief comment. They were asked to uphold the validity of the modification of the lease not by the petitioner but by the Boston & Maine and they were asked to uphold the validity of the modification of the lease only if it became material by reason of the fact that the Court should be of the opinion that recovery could be had under the terms of the original lease. Because the Court determined that recovery could not be had under the terms of the original lease, it became unnecessary to decide this question. The only question asked by the petitioner, and the only question decided by the Court, was a question of strictly New Hampshire law, a question dependent solely on the interpretation of the language of the lease of May

25, 1936. By reason of the nature of that decision, no further questions were involved, no further questions had to be decided and the decision of any further questions would not have affected the result. The petition for writ of certiorari should be denied for this reason.

Respectfully submitted

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